

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW THOMAS DRAGNA,

Defendant and Appellant.

G049756

(Super. Ct. No. 09HF2013)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Reversed and remanded.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

A jury convicted Matthew Dragna of first degree murder (Pen. Code, § 187, subd.(a)) for killing Damon Nicholson, and found true the special circumstance that the murder occurred during a robbery (Pen. Code, § 190.2, subd. (a)(17)(A)). The trial court sentenced Dragna to life in prison without the possibility of parole. Dragna contends the trial court erred by failing to suppress statements he made to police in the custodial setting of a residential drug treatment center before he was arrested and received warnings under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also argues that because he invoked his right to a lawyer again after he was arrested, the trial court erred by admitting statements he made when the police ignored his invocation, read him his *Miranda* rights at the police station, obtained his purported waiver, and continued questioning him.

Alternately, he contends the officers obtained these statements by coercive lies, ruses, threats, and appeals to religion that vitiated the voluntariness of his statements. He also argues his trial attorney rendered ineffective assistance of counsel by failing to request a mistrial after the jury heard a brief portion of an unredacted version of his police interview; he asserts the prosecutor committed misconduct by suggesting facts outside the record in closing argument; and argues the trial court erred by denying his request for an alibi instruction.

At oral argument, the Attorney General conceded the *Miranda* waiver detectives obtained from Dragna at the police station violated the prophylactic rule under which the police may not attempt to question a suspect who has invoked his right to deal with authorities only through a lawyer. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 (*Edwards*).) The Attorney General offered no justification for the police to reinstate questioning apart from the stationhouse waiver, which was invalid under *Edwards*. But the Attorney General contends the *Edwards* violation was harmless. The prosecutor, however, identified Dragna, who did not testify, as his “star witness” based on the statements he made under police questioning placing him at the murder scene as an aider

and abettor. Consequently, because admission of the statements despite the *Edwards* error was not harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)), we must reverse the judgment and remand for a new trial.

I

FACTUAL AND PROCEDURAL BACKGROUND

Because the underlying facts of the offense do not bear on the legal issues on appeal, we set them out only briefly. Dragna's acquaintance, Larry Bradshaw, engaged in a sexual relationship with Nicholson for two years after the pair met on a dating Web site. Every six to eight weeks, Bradshaw would enter Nicholson's home through an open sliding door, find the lights off and Nicholson blindfolded for their sexual encounter, and afterwards Bradshaw would leave the door ajar when he departed, with Nicholson still blindfolded. According to Bradshaw, Nicholson told him to invite other potential partners to join them.

Bradshaw met Dragna through an ad Dragna posted on Craigslist seeking an "older male." Dragna was 19 years old. The two engaged in a sexual relationship for three to four weeks before Bradshaw brought Dragna to Nicholson's residence.

In late October 2009, Bradshaw picked Dragna up from his apartment in Lake Forest and drove him to Nicholson's home in Laguna Beach. Nicholson appeared just as Bradshaw had interacted with him on every other occasion: in the dark, blindfolded, and on his knees. The three men engaged in approximately 30 minutes of sexual activity, then Bradshaw and Dragna left.

The next night, another man went to Nicholson's home and noticed a laptop computer on the coffee table. The man left around 9:30 p.m.

Sometime later that night, Dragna returned to Nicholson's home with his friend Jacob Quintanilla, who drove. Dragna did not have a cell phone, but Quintanilla's cell phone records showed him near Nicholson's home in Laguna Beach around 10:12 p.m. and back in Lake Forest by 11:16 p.m.

When Nicholson did not appear for work on October 23, 2009, his coworker Lindsey Scott went to his house to check on him. Scott noticed the sliding glass door had been left open, and when she entered, she saw Nicholson's body on the living room couch. Nicholson was dead, and an autopsy revealed two blows to the head had fractured his skull.

His pockets had been turned inside out, a computer mouse lay on the coffee table, but investigating officers found no laptop in the home and determined other items were missing, including Nicholson's cell phone. The officers found trash dumped in the middle of the kitchen floor and the kitchen trash can lacked a trash bag. Forensic testing revealed Dragna's DNA on the trash can handle. The investigators recovered Nicholson's cell phone in a dumpster at the apartment complex where Dragna and Quintanilla lived in separate apartments.

Officers eventually interviewed Dragna at the residential Teen Challenge drug and alcohol rehabilitation center in Santa Ana. At first, Dragna claimed his only two visits to Laguna Beach had been with his sister. As the interview progressed, he admitted going with a "buddy" to Nicholson's house, but claimed he waited in the car for about 10 to 30 minutes, and when his friend returned to the vehicle, they smoked a marijuana joint and departed. He denied meeting Nicholson, but when he learned of his DNA on the trash can, he changed his story, asserting he and a friend on one occasion picked up Nicholson to engage in sexual acts, but in a park and not at Nicholson's home. Shifting his story again, Dragna later stated he had not entered the house on the day the three men went to the park, but may have gone inside and taken out the trash a month or so earlier.

The interviewing officers arrested Dragna for Nicholson's murder. In the interim period before the officers transported Dragna to the police station, he stated, "I need a lawyer," and "You guys have me in a situation where I don't even know what to do right now. I have to talk to a lawyer. [¶] I don't know what to do man." He also had

stated in the middle of his interview before he was arrested, “I think I’m going to need a lawyer” and suggested to the officers, “If you guys want to talk to me, just talk to a lawyer,” but he had continued speaking with the officers.

The officers eventually drove Dragna to the Laguna Beach police station, where after receiving a *Miranda* advisement, he admitted he had met someone online who had taken him to meet Nicholson. He also admitted he had gone to Nicholson’s home the day before the murder and engaged in sexual activity with him.

Dragna explained he told his friend Quintanilla about the encounter because he believed Quintanilla would be interested in similar acts. In a key admission, Dragna disclosed he went to Nicholson’s house with Quintanilla on the day of the murder, but claimed he stayed in the car to smoke cigarettes and marijuana. Dragna said he attempted to call Quintanilla, but other evidence showed he had no cell phone at the time. Receiving no answer to four of his calls, Dragna claimed he exited the car and encountered Quintanilla on the stairs of Nicholson’s home, coming down as Dragna was heading up.

According to Dragna, Quintanilla told him he argued with Nicholson, struck him with a bat to knock him out, but killed him. Dragna denied knowing Quintanilla had brought a bat, which Dragna claimed was a miniature one that Quintanilla “must have had . . . on him the whole time. He was wearing a jacket.” According to Dragna, Quintanilla claimed the argument stemmed from a drug deal involving four pounds of marijuana, but no evidence suggested Nicholson dealt drugs.

In the interview, Dragna also claimed he entered Nicholson’s residence only to find a trash bag for Quintanilla’s bloody clothing. An expert, however, testified there was almost no blood spatter from the blows Nicholson received. While in the house, Dragna saw Nicholson on the couch with a pillow over his head, and heard him emit a snoring sound. Dragna claimed Quintanilla placed Nicholson’s laptop, cell phone,

and other items into bags, which Dragna helped carry to the car, and then they drove back to their apartment complex.

II

DISCUSSION

We need only reach Dragna's claim of *Edwards* error, which the Attorney General concedes, but asserts was harmless. Under *Edwards* and its progeny, "law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation." (*Davis v. United States* (1994) 512 U.S. 452, 454.) As our Supreme Court has explained, "'Once the suspect has "expressed his desire to deal with the police only through counsel, [he] is *not subject to further interrogation by the authorities* until counsel has been made available to him, *unless the accused himself* initiates further communication, exchanges, or conversations with the police.'" [Citation.] Once the *Miranda* right to counsel has been invoked, no valid waiver of the right to silence and counsel may be found absent the "*necessary fact* that the accused, not the police, reopened the dialogue with the authorities.'"" (*People v. Mattson* (1990) 50 Cal.3d 826, 859, original italics.)

The Attorney General concedes Dragna invoked his right to counsel following his arrest, while awaiting transportation to the police station, in either or both of his statements that "I need a lawyer" and "[y]ou guys have me in a situation where I don't even know what to do right now. I have to talk to a lawyer." In her respondent's brief, the Attorney General argued that *Edwards* became inapplicable when, "after [Dragna] was taken to the Laguna Beach Police Department and was given his *Miranda* warnings, [he] then initiated further conversation with the police when he asked the officers, 'So what do you guys wanna know?'" The Attorney General argued Dragna's "expressed willingness to answer questions after acknowledging his *Miranda* rights was sufficient to constitute an implied waiver of such rights."

But *Edwards* itself held that “when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.” (*Edwards, supra*, 451 U.S. at p. 484.) *Edwards* thus “added a second layer of protection” to *Miranda*’s advisement requirement, “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.” (*Michigan v. Harvey* (1990) 494 U.S. 344, 350.) At oral argument, the Attorney General conceded the error, and argued only that the *Edwards* violation was harmless, to which we now turn.¹

The Attorney General argues any error in admitting Dragna’s statements to the police despite the *Edwards* violation was harmless because compelling evidence pointed to his guilt, including “that his DNA was found at the scene, the victim’s cell phone was in his dumpster, and he possessed the victim’s stolen goods following the

¹ We note that in reviewing the transcript of Dragna’s statements to the police, the trial court observed at the pretrial suppression hearing that the prosecutor could argue “the defendant reinitiates conversation with the police” *before* being transported to the police station.

But the prosecutor had not raised this argument and abandoned the line of inquiry, agreeing with the trial court that because he did not intend to offer into evidence any statements Dragna made in the interim period between his arrest and subsequent interrogation at the police station, anything Dragna said during that time was irrelevant. And as noted, the Attorney General before withdrawing the contention, argued on appeal only that Dragna “. . . Reinitiated Conversation with [the] Police **Following** *Miranda* Warnings” at the station. (Boldface added.) We therefore find forfeited the theoretical possibility Dragna may have reinitiated contact with the police in the interim period while awaiting transportation. (See also *Connecticut v. Barrett* (1987) 479 U.S. 523, 527 [to avoid an *Edwards* violation, the prosecutor must establish, in addition to reinitiation by the suspect, that he “‘knowingly and intelligently waived the right he had [just] invoked’”]; accord, *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044.) Simply put, the prosecution bears the burden of demonstrating the validity of a defendant’s *Miranda* waiver (*Colorado v. Connelly* (1986) 479 U.S. 157, 168), and in light of the *Edwards* violation failed to meet that burden here.

murder.” The flaw in the Attorney General’s position is that none of this or similar evidence established *when* Dragna was there, which was critical for his felony-murder robbery conviction. The presence of Dragna’s DNA was consistent with Bradshaw’s testimony about an earlier tryst. If not for Dragna’s admission he was with Quintanilla at Nicholson’s apartment when he was killed, albeit outside in the car, which the jury discounted, it is reasonably possible the jury may have concluded Dragna merely shared personal information with Quintanilla that led the latter to plan the robbery on his own and that Dragna did not share his intent. Thus, Dragna had evidence to support a defense that he was only an accessory after the fact or guilty of receiving stolen property.

But in any event the test for *Chapman* error does not turn on the weight of the evidence. “[T]he appropriate inquiry is ‘not whether, in a trial that occurred without the error, a guilty verdict would *surely* have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.’” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, *italics original.*)” (*People v. Quartermain* (1997) 16 Cal.4th 600, 621 [erroneous admission of defendant’s statement was prejudicial]; accord *People v. Neal* (2003) 31 Cal.4th 63, 86 [erroneous admission of defendant’s confessions was prejudicial].) The *Chapman* standard requires “the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman, supra*, 386 U.S. at p. 24.) Reversal is required if there is a “‘reasonable possibility that the evidence complained of might have contributed to the conviction.’” (*Id.* at p. 23; *Yates v. Evatt* (1991) 500 U.S. 391, 403 (*Yates*), disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.)

“To say that an error did not ‘contribute’ to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous.” (*Yates, supra*, 500 U.S. at p. 403.) “To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything

else the jury considered on the issue in question, as revealed in the record. Thus, to say that [the error] did not contribute to the verdict is to make a judgment about the significance of the [error] to reasonable jurors, when measured against the other evidence considered by those jurors independently of the [error].” (*Id.* at pp. 403-404.)

Dagna’s police statements were a centerpiece of the prosecution’s case. Indeed, they led the prosecutor to describe defendant as his “star witness.” It is therefore impossible to say the statements did not contribute to the jury’s verdict. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 444 [“The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State’s two best witnesses”].) Because there is no basis here to disregard the prosecutor’s assessment, we cannot say that admission of the statements despite the *Edwards* error was harmless beyond a reasonable doubt.

III

DISPOSITION

The judgment is reversed and the matter is remanded for defendant’s retrial.

ARONSON, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.